Supreme Court, U.S.
FILED
DEC 9 - 2003
OFFICE OF THE CLERK

(3)

No. 03-454

In the

Supreme Court of the United States

RICHARD ALLEN ROSELL, ON BEHALF OF HIMSELF AND SIMILARLY SITUATED EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION,

Petitioners,

v.

PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

Respondent's question is unrelated to the issues raised by the Petition. It is entirely irrelevant to the gravamen of the Petition whether or not the courts below *correctly or incorrectly conjectured* as to whether Petitioner exhausted his administrative remedies under the routine *common law contract* known as Labor/Management Agreement [LMA]. Invoking his Seventh Amendment right, Petitioner demanded to be heard by a jury as to all charges and counter-charges of breach of contractual obligations (including exhaustion of so-called administrative remedies) under the LMA. Further disputing Respondent's claim that he has any contractual obligation under the LMA or any other contractual instrument to arbitrate any of his disputes, Petitioner demanded his statutory jury trial right for resolution of the subject issue pursuant to § 4 of the Federal Arbitration Act [FAA], 9 U.S.C. § 1, et. seq.

Abnegating Constitutional and statutory mandates, the courts below denied the Petitioner (and the class he represents) fundamental Constitutional and statutory rights to be heard by a jury on contested, common law contractual matters. Such distinct violations now permeate the inalienable jury trial rights of nearly two million Federal Civil Service Employees.

The Questions the Petition presents are precisely what the *raison d'etre* of this Supreme Court envision. The writ should be granted.

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JURISDICTION

This Court's subject-matter jurisdiction over the Petition is not contested.

REPLY TO RESPONDENT'S "STATEMENT"

1. Respondent's Statement merely affirms the highly contested nature of the common law contractual disputes erroneously resolved by the courts below instead of a jury. Such is the state of the dispute between the parties that there is even no accord as to which provision of the common law contract (the LMA) actually controls. Petitioner's "class-based" FLSA claims are not issues of Article 17 of the LMA generally, but of Article 17 Section 15[1] specifically–a provision distinct and different from the provision upon which the Respondent predicates its entire Opposition.

2. The Statement is also remiss of the highly contested common law contractual issues as to whether or not the Petitioner has fulfilled all of his contractual

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[1]It provides, in relevant part: "**Grievances which may impact on more than one employee** may be submitted in writing by the Local President (or designee) directly to the Executive Director (or designee).

"The grievance shall be specific concerning the act(s) complained of, including date(s) and person(s) involved; the provision(s) by Article and section of this Agreement, alleged to be misinterpreted or misapplied, if a violation of the Agreement is alleged, otherwise the grievance must specify the rule, regulation, or policy or conditions of employment alleged to have been violated; and the corrective action desired ...." [Emphasis added].

obligations under the LMA (and, conversely, whether the Respondent failed its contractual obligations under the LMA)–issues exclusively within the province of a jury to resolve.

3. Indeed, such is the state of failure of the Statement that it completely omits to even make a passing reference to the fact that Petitioner's grievance (as well as underlying lawsuit) was filed *"on behalf of himself and similarly situated employees of the [Agency]"* and, thus, subject to the class-based procedures of the LMA. The omission is further notable inasmuch as the Opposition's cover page does not state the formal caption of the Petition:

"RICHARD ALLEN ROSELL, ON BEHALF OF HIMSELF AND SIMILARLY SITUATED EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION."

REPLY TO RESPONDENT'S "ARGUMENT"

1. Respondent's first argument regurgitates the district court's erroneous finding that the LMA is "the exclusive procedure available to the Union and Bargaining Unit employees for resolving grievances" and that Petitioner "did not attempt to comply with the negotiated grievance process." This is simply begging the question. It was not for the district court to resolve either factual dispute and those implicit inasmuch as jury trial was demanded both under the Seventh Amendment and the FAA. The latter to address the Respondent's claim that the Petitioner (and the class he represents) are bound by a valid contract to arbitrate the myriad of contractual claims and counter-claims the

court resolved in chambers.

2. Simply put, the Respondent's second argument is bizarre. Citing *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 719 (1999), Respondent makes the blanket assertion–quote– "(t)he Seventh Amendment right to a jury trial does not apply to suits against the United States." Neither at the cited page (719) or anywhere else in said decision has this Court even suggested the elimination of the Seventh Amendment with respect to the United States. While *City of Monterey* addressed the narrow and specific issue as to jury trial right associated with governmental exercise of eminent domain (regulatory taking) and compensation claims, the decision itself affirmed the propriety of jury trial and verdict upon which the dispute was predicated. Indeed, citing its precedent in *Markman v. Westview Instruments*, Inc., 517 U.S. 370 (1996), this Court reiterated in *City of Monterey* the central tenet:

> "In actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment." At page 718.

Although, as a general principle, the United States does have sovereign immunity, it is neither absolute nor beyond constitutional reach. To wit, it has been held:

> **"... Congress has the right to prescribe terms upon which the government consents to be sued. But it cannot**

> **authorize the government to sue an individual in suit at common law, and deny him therein a trial by jury. Nor can it do this indirectly by attaching to his right to sue the government a condition that he shall surrender a privilege guaranteed him by the Constitution. He may, by formally giving his assent thereto, waive the right of trial by jury; but it is the duty of Congress to *preserve* the right in all suits at common law."** *McElrath v. United States*, Sup. Ct., 426, 430-431 (Oct. 1880). [Italics in original].

Here, the Respondent has not identified a single statutory term or condition set by Congress that proscribes or delimits Petitioners' Seventh Amendment right to be heard by a jury on the myriad of common law contractual issues at bar. Nor is there any suggestion that in subjecting itself to the negotiation and execution of a routine collective bargaining contract (LMA), the Respondent (an agency of the United States) was acting or engaging in any matter that may be perceived governmental or sovereign. It engaged in the same actions and transactions that employers in private industry routinely are involved in (i.e. negotiate and contract collective agreements with their employees) without abnegating the supremacy of the Seventh Amendment. And there is nothing to suggest that the Petitioners have formally given their consent to waive or abandon their Constitutional right tangent to the LMA. They have not done so and the Respondent does not claim so.

What is left of the Respondent's argument is its cite to *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Far from affording the Respondent support for its proposition, the decision merely addresses pleading standards that have long been repealed by the Federal Rules of Civil Procedure.

As for Respondent's argument that the FAA does not afford Petitioner jury trial right or that the provision "was never properly invoked,"suffice it to note that the Petitioner specifically invoked his right under FAA § 4 (see, inter alia, C.A. APP, page 118). The provision itself is misquoted. FAA, 9 U.S.C. § 4 is in no way confined, as Respondent have us believe, to a person "aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration." The contrary is true and the provision speaks for itself:

> " .... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. *If no jury trial be demanded by the party alleged to be in default, ..., the court shall hear and determine the issue. Where such an issue is raised, the party alleged to be in default may ... demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for*

> *arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. ....*" [Italics added].

Against the Respondent's claim that "arbitration" is "the exclusive remedy" available to him under the LMA, Petitioner maintained and still maintains that he made no accord under the LMA or any other contract to submit his claims at bar to arbitration and that no valid arbitration agreement exists between him and the Respondent. He demanded his jury trial right which was denied.

There is, indeed, nothing the Opposition proffers to controvert Petitioners' claim that their Seventh Amendment and statutory [9 U.S.C. § 4] rights to jury trial were violated by the courts below.

3. Respondent also disputes Petitioners' claim that they were denied equitable enforcement of "cardinal principles of justice" pronounced by the appeals' court itself as set forth at pages 19-22 of the Petition. The remarkable failure of the Opposition to address said claim is self-evident.

CONCLUSION

It cannot be more apparent that the Respondent's Opposition has wholly failed to address the gravamen of the Petition at bar.

WHEREFORE, Petitioners' respectfully submit that their petition for writ of certiorari should be GRANTED.

RESPECTFULLY SUBMITTED,

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